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United States Supreme Court

OCTOBER TERM, 1959

No. 608

L. T. MONTFORD, A. Z. HANDFORD AND J. C. HAMILTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Zach H. Douglas
Attorney for Defendant, L. T. Montford, J. C. Hamilton and A. Z. Handford.

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered upon November 23, 1959, affirming the judgment of the District Court of the United States for the Middle District of Georgia rendered on May 21, 1959.

OPINION BELOW

The opinion of the court below entered upon November 23, 1959, is printed in an appendix to this petition, for the convenience of this court.

BASIS OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was filed, as stated, on November 23, 1959; Application for Stay of Mandate pending application in this Court for write of certiorari was made December 4, 1959, and an order was entered staying the mandate for thirty days, from November 23, 1959 pending the application for writ of certiorari in this Court.

Jurisdiction is invoked under Section 1254(1) of Title 28 of the United States Code; and Rule 19(1)(b), Revised Rules of the Supreme Court of the United States, of Title 28 of the United States Code.

QUESTIONS PRESENTED

The questions presented here for determination are important, but may be stated briefly. They are as follows:

I. The government subpoened and had sworn in the presence of the jury an array of witnesses but only utilized one during the trial. The petitioners commented upon this in closing argument. The government attorney in his rebuttal argument made a statement to the effect that the witnesses were equally available to petitioner. *Quaere*: was the comment by

the government's attorney allowable undert he prior decisions of this court?

II. The prosecuting attorney in his closing argument stated: "I have never seen evidence that was more clear in my life about a violation of the Internal Revenue Law." Objection was made by counsel for petitioner and motion for mistrial was made. The court did not sustain the objection but commented counsel "went a little bit too far." *Quaere*: was this statement within the area of fair comment as deliniated by this Court? If not was it cured by the court's comment?

In answering these questions petitioner assigns as error the decision of the United States Court of Appeals which sanctioned and approved both comments made by the prosecuting attorney.

STATEMENT OF THE CASE

All three of the appellants were indicted jointly on six counts charging possession, transportation and sale of untax paid whiskey. They all entered pleas of not guilty.

The appellant Handford made a motion for severance which was denied by the District Judge. Only one witness was used by the Government. He was J. G. Gray and was Assistant Supervisor of the State Beverage Department of the State of Florida who was working in concert with Investigator Scott of the United States Treasury Department. A number of witnesses were called by the Government, sworn and sequestered. (R. p. 10).

The witness Gray testified in substance that he had met

appellant Montford at a cafe in Blountstown, Florida in the early morning hours of March 14, 1958. He and Investigator Scott had been in company with one another and had discussed with Montford the purchase of moonshine whiskey. They were assigned to North Florida in an undercover capacity. Montford advised that he could furnish moonshine whiskey at $23. a five gallon can delivered in Bainbridge, Georgia. They made arrangements to meet him that night at a drive-in restaurant in Bainbridge at which time he would be able to deliver to them fifteen cans of moonshine whiskey or seventy-five gallons. Apparently, the meeting was two weeks later on March 28, 1958 (R. p. 15) at around 9:00 o'clock in the evening. Montford met them there and requested that they follow him to the appallant Handford's juke joint or cafe which was three blocks East of the drive-in in the City of Bainbridge. The appellant Handford was not there but returned in a short while when the witness was introduced to him and Montford asked if it would be all right for Handford to take the truck and load it for them. They instructed Handford as to how the cans were to be loaded on the truck. He got in the truck belonging to the Government and drove away with instructions for them to meet him at a rendezvous approximately three miles East of Bainbridge at a roadside park.

Montford, Gray and Scott proceeded to the wayside park and waited for the return of Handford. While waiting, Montford entertained them with details as to the proper way to set up a moonshine still. Upon the return of the Government vehicle, Investigator Scott turned the dome light on in Mr. Montford's car and paid Montford $345. for fifteen cans of whiskey. The witness got out of Montford's car and checked the whiskey then proceeded to drive to Donalsonville, Georgia where the whiskey was checked with Georgia Beverage

Department's agents and they proceeded to destroy the non-tax paid whiskey "except five gallons which they held for evidence." (R. p. 20).

Subsequently, on April 2nd, Scott and Gray again met Montford at the drive-in and followed him to Handford's place and Handford advised that he would not be able to make this trip and recommended appellant J. C. Hamilton, who would get the load for them. Hamilton entered the Government's truck, drove off and substantially the same routine was followed as in the incident of March 28th.

On cross-examination, it developed that the United States Government had control of the vehicle and that the money paid for the whiskey was Government money. (R. p. 36).

On cross-examination by counsel for Handford, the witness testified that the truck belonged to the United States or that they had control thereof, bought gasoline, oil and tires for the vehicle. (R. p. 43) On the night of March 28, they went out to the roadside park where there were no lights and pulled off the highway. The witness doubted whether the trees were in full leaf but there were trees there. (R. p. 45) When the Government's truck was returned it was parked in such a way as to put Montford's automobile and the Government's truck rear to rear. Gray, Scott and Montford were in the Montford automobile and the dome light was turned on and Montford was paid for the whiskey. Gray got out and when he went to the truck Handford was standing at the rear. (R. p. 46) On an attempt to shake the witness as to his identification of the appellant Handford, he was positive that the man who was standing at the rear of the truck was the appellant. (R. pp. 46, 52).

On further cross-examination in reference to the defendant, Hamilton, he testified that he had seen Hamilton at Handford's place of business and had a short discussion with him. He saw him only twice on one day, at Handford's place of business and again when he delivered the whiskey to the agents East of Bainbridge. He had had no arrangements for the purchase of the whiskey from Hamilton. (R. p. 55).

Hamilton also drove the Government vehicle; it was dark when the whiskey was delivered to the roadside park but the witness had talked to Hamilton at the rear of the truck after delivery of the whiskey. (R. p. 55).

The witness Gray testified in re-direct that Agent Scott was present in the court that day. (R. p. 56)

Only one witness was introduced by the Government. The five gallon can which the witness stated was saved for evidence was not offered. At the conclusion of the evidence, motion for acquital was made on behalf of all of the appellanta (R. pp. 57, 59). This was overruled.

Counsel for the appellants opened the argument and comment was made that Mr. Scott and a number of other witnesses were sworn who were not called as witnesses for the Government. (R. pp. 62, 63, 66).

In his argument to the jury, the Assistant United States Attorney made the statement:

> "And I would remind you of this, and I am sure the defense lawyers are well aware that the rules of criminal procedure make available to every defendant the processes of this Court, not just to the Government.

The processes of this Court are available to these defendants, and had they wanted one of these witnesses, right there they sit for them." (R. p. 69).

Counsel for the appellant, Handford, objected to the argument, that it was improper for Government's counsel to say that the Government's witnesses are available to the defendants. Counsel took the position that such argument was so highly improper as to warrant the direction of a mistrial which was moved at that time. (R. p. 69) Counsel further made the point that such argument was an invasion of the defendant's right not to put up evidence. (R. p. 70). The Court overruled the objection and the motion.

The Assistant United States Attorney continued in his argument and made the statement "I have never seen evidence that was more clear in my life about a violation of the Internal Revenue laws."

Objection was made by Counsel for the appellants that Government's counsel was testifying and comparing this case with his previous experience. It was urged that it was improper argument for Government's counsel to compare the case on trial with other cases that he had tried and motion for a mistrial was made.

The Court stated that he thought counsel went a little far and warned him not to argue about what he had seen. However, the objection was not sustained and no ruling was made on the motion for a mistrial. (R. p. 71).

In his charge to the jury, the Judge instructed the jury "that generally and in cases of this kind, the testimony of a single witness to a fact is sufficient to establish that fact if the jury

believes that witness and his testimony as to such fact." (R. p. 79).

Exception was taken to this portion of the charge and in connection with the ruling of the Court on the argument of counsel for the Government that the defense could have called these Government witnesses. Counsel stated in his exception that the Court ought to have given in charge in that connection that where a party has in his possession certain evidence and fails to produce it there arises a presumption that such evidence was not favorable. It was urged that a charge of that or similar nature was necessary to clear up the court's charge as to one witness being sufficient and the court's ruling on the objection to the Government argument. (R. pp. 80, 81).

The Court also charged the jury on the subject of entrapment. In the course of that charge, he said: "A suspected criminal may be offered an opportunity to transgress in such manner as is usual therein . . . (R. p. 78). This was excepted to in that there was no evidence on the trial of the case that there was a suspected criminal and that those references were unfavorable and prejudicial, certainly and in any event to the defendant Handford, represented by counsel making the exception.

Upon this submission of the case, the jury convicted all three defendants upon all six counts. (R. p. 6)

Thereupon, the defendants below moved the Court to set aside the verdict of guilty and enter judgment in accordance with the motion for judgment of acquittal made at the close of all the evidence therein, and in the alternative that the Court set aside the verdict and grant a new trial for reasons set out in the motions at pages 89 and 91 of the record. This

motion was overruled (R. p. 92) and thereupon the Court imposed sentence of three years each on the defendants Montford and Handford (R. pp. 83, 85) and eighteen months on the defendant Hamilton (R. p. 88).

An appeal was taken to this Court and the case brought here upon a transcript of the entire evidence and proceedings.

REASONS FOR GRANTING THE PETITION

I.

It appears that the United States Court of Appeals for the Fifth Circuit has rendered an opinion which is in conflict with both applicable decisions of this Court and decisions of other courts of appeal.

The opinion of the Court of Appeals as evidenced by its decision, takes the positions that the statement of the government attorney was not improper or prejudicial. This appears to be in conflict with other decisions; the resultant ambiguity should be settled with finality.

This Court has early recognized the rule that in criminal cases if a person has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. *Graves v. United States,* (1893) 150 U.S. 118, 14 S.Ct. 40, 37 L.Ed. 1021. This rule has been followed and reiterated by numerous Courts of Appeals. —
United States v. Jackson, 257 F.2d 41 (3 Cir. 1958); *McClanahan v. United States,* 230 F.2d 919 (5 Cir. 1956); *Yaw v.*

United States, 228 F.2d 382 (9 Cir. 1955); *Ford v. United States*, 210 F.2d 313 (5 Cir. 1954).

Once it has been ascertained that the government is not going to call a witness who is a natural part of its case it becomes the subject of proper comment on the part of counsel for the defense. To deny the defendant the privilege of bringing this telling point to the jury is to deprive him of a substantial right. *United States v. Jackson*, 257 F.2d 41 (3 Cir. 1958).

In the *Jackson* case the witness who was not called was an informer whose connection with the case was testified to by the main government witness. The court noted that such a person was an "important" and "natural part of the government's case and certainly he was not the kind of witness the defendant could be expected to call."

In the case at bar the facts are strikingly similar. Agent Scott, among the other witnesses sworn by the government in the presence of the jury, was a *natural part* of the government's case and was not the kind of witness the defendant could be expected to call. Therefore, it was within the proper scope of comment by petitioners' counsel.

Admittedly it was natural and necessary for the government to attempt to explain away this extremely telling argument. The government transgressed the ground of fair comment, however, when counsel erroneously stated that the witness was equally available to both sides. The Court of Appeals in their decision accepted this theory in affirming the judgment of the District Court.

It cannot be said that a federal agent is *equally available*

to the defendant even though he was physically present in court. The question of *equal availability* of witness may in a given situation involve the consideration of many factors. Among other things the relationship of the parties and the nature of the testimony that he might be expected to give. *McClanahan v. United States*, 230 F. 2d 919 (5 Cir. 1956). As was stated by Frank, Circuit Judge, in commenting upon the exception to the general rule, "even if that rule were to be followed *it would not apply where there is a likelihood of bias on the part of the person not called as a witness in favor of one party*, for then that person is not, in a true sense, "equally available" to both parties." (Emphasis added.) *United States v. Beckman*, 155 F.2d 580 (2 Cir. 1946). Certainly this is the reasoning that should have been applied in the instant case. Federal agents could reasonably be expected to be biased in favor of the government, therefore, the court should not have allowed the government to state such witnesses were equally available to the petitioners. The decision of the Court of Appeals approving the theory advanced by the government appears to be directly in conflict with the holding in the *Beckman* case. This inconsistency if allowed to stand will confuse the area of permissible comment allowed to counsel and deprive parties in litigation of substantial rights.

The effect of swearing in the witnesses in the presence of the jury was an attempt to corroborate testimony of the government's sole witness without the jury being given the benefit of hearing other witnesses' testimony. Why else would counsel for the government inquire in the last few questions whether Federal Agent Scott was present at both transactions and whether he was present in court on the day of the trial. (R. p. 56).

The error of the court allowing such comment was further compounded by its charge, after strenuous objection to the district attorney's comments, that the case could be proven by one witness. This in effect supported the government's contention.

II.

This Court has clearly and concisely defined the duties and obligations of the United States Attorney in the case of *Berger v. United States*, 295 U.S. 78, 88, 79 L.Ed. 1314, 1321:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use very legitimate means to bring about a just one. "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

That the government's attorney may not make statements or insinuations in closing argument based on personal knowledge, belief, or on anything other than evidence adduced at trial has been noted by this Court. *Lawn v. United States*, 355 U.S. 339, 359, note 15 (1958), 78 S.Ct. 311, 323, 2 L.Ed 2d 321. (Citing cases.) This proposition is uniformly recognized by lower federal courts and the majority of state tribunals. 50 ALR 2d 766. It should be strenuously applied where a statement amounts to a personal assertion by the prosecution, that he believes that the defendant is guilty. The dignity, influence and prestige of the district attorney's office would naturally influence the trier of the facts, causing him to give undue weight to the prosecutor's mere assertion of belief.

In the instant case the statement was made by the prosecuting attorney, i.e. "I have never seen evidence that was more clear in my life about a violation of the Internal Revenue Code." was of such a nature that it deprived the petitioner of a fair trial. In addition it was outside the scope of permissible comment as deliniated by this Court.

The prosecutor was making statements about other cases, and evidence which was not supported by the record. He was, in fact, testifying as to his past experience, a procedure grossly unfair and which has been uniformly condemned.

When objected to, the court admitted that "perhaps counsel goes a little bit too far there. You may argue your inferences from this evidence, whether it is weak or strong in your opinion, and you may argue that as fully and completely as you want to, but about what you have seen, let's leave that out." By these words the Court recognized that the comments were improper. Petitioners' contend the court's state-

ment was not sufficient to correct the prejudicial impact of the prosecution's improper comment. It is admitted that improper statements may be rendered harmless by appropriate corrective action. To be effective, however, the corrective action must be sufficiently definite and emphatic or forceful to nullify the harmful impression left in the mind of the jurors. 50 ALR 2d 766, 794. It is petitioners' contention that this test was not met in the instant case and that necessarily they were deprived of a fair trial.

PRAYER

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit should be granted.

Zach H. Douglas
Attorney for Defendant, L. T. Montford, J. C. Hamilton and A. Z. Handford.

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CERTIFICATE

I hereby certify that I have served a copy of the foregoing petition for Writ of Certiorari, by mail, to the Honorable Frank Evans, United States Attorney, Macon, Georgia, and a copy to the Solicitor General, Department of Justice, Washington, D. C. on this 22nd day of December, 1939.

Zach H. Douglas

APPENDICES

Opinion of United States Court of Appeals for the Fifth Circuit.

Rendered November 23, 1959.

Before RIVES, *Chief Judge*, and TUTTLE and JONES, *Circuit Judges*.

PER CURIAM: The Judgment is AFFIRMED. In the light of the argument by counsel for the appellants that the failure of the Government to call other witnesses shown to have had knowledge of the transactions would authorize the jury to infer that such witnesses would have testified favorably to appellants, it was not error for the United States Attorney, in his argument, to say: "The processes of this court are available to these defendants, and had they wanted one of these witnesses, right there they sit for them." There is nothing in this Court's decision in *McClanahan v. United States*, 5 Cir., 250 F.2d 925, that conflicts with what we hold here.

Opinion in McClanahan v United States decided by the United States Court of Appeals, Fifth Circuit rendered March 16, 1956. 230 Fed. 2nd 919.

Before TUTTLE, CAMERON and JONES, Circuit Judges. JONES, Circuit Judge.

The appellant, R. I. McClanahan, was an electrical inspector employed by the City of Houston, Texas. He made the acquaintance of C. L. Fitzhenry, a real estate broker and building contractor. Appellant provided funds for the purchase of dwellings from veterans who had rights to home loan guaranties by the Veterans Administration. These veterans, all of whom were without any intention of occupying the property acquired and simultaneously sold by them, were located by Benjamin Skinner. Skinner was brought into the picture by Fitzhenry. Skinner received $50 for each veteran he procured. The veteran, brought to Fitzhenry, would fill out the forms for procuring an insured V. A. Loan and a contract for the purchase of a specific property. The receipt of a down payment was acknowledged, but was not made by the veteran. The property, the subject matter of the transaction, was never seen by the veteran. In completing the loan application form, each of the veterans was required to state as the purpose of the loan that he was acquiring a home. Each veteran and his wife were required to make an affidavit that they would occupy the property as their homestead. None of the six veterans in the transactions involved in this appeal saw the property and none of them had any real intention of occupying it. Upon the transfer of title to the veteran and the closing of the loan he would convey the property to the appellant, receive between four and five hundred dollars, and go on his way. When the title to a dwelling was in appellants' name he provided the funds with which to pay the veteran.

Fitzhenry then found purchasers for the equity above the V. A. guaranteed loan at prices at or in excess of a thousand dollars. Appellant was reimbursed for his outlay in the venture, and the remainder was divided between Fitzhenry and appellant.

Fitzhenry and appellant were charged in a thirty-one count indictment. Also named in the indictment as a defendant was Charles H. Baldridge, as to whom the indictment was dismissed on motion of the United States Attorney. The first thirty counts related to ten separate transactions, each of which formed the basis of three counts of the indictment. Of these groups the first count charged that the defendants "did knowingly and wilfully cause to be made a false, fictitious and fraudulent statement and representation" in inducing a named veteran to make the false statement in the loan application. 18 U.S.C.A. § 1001, § 2. The second of each group of three counts charged that McClanahan and Fitzhenry "did knowingly and wilfully, by a scheme, trick and device, conceal and cover up and caused to be concealed and covered up a material fact" that the named veteran did not intend to occupy the premises as described as his home. 18 U.S.C.A. § 1001. The third of the series of counts charged that Fitzhenry and McClanahan "did knowingly and wilfully cause to be made a false, fictitious and fraudulent statement and representation" in causing the veteran and his wife to make the affidavit of intent to occupy the property as a homestead. 18 U.S.C.A. § 1001, § 2. Each of the courts recites that had the Veterans Administration known that the veteran did not intend to occupy the premises as a home the V. A. loan guaranty would not have been issued. The thirty-first count charged the appellant, Fitzhenry, and Baldridge with conspiracy to do what the prior counts charged had been done and set forth thirty-three alleged overt acts. 18 U.S.C.A. § 371.

Fitzhenry was convicted on all counts. The appellant, R. I. McClanahan, was found guilty on the substantive counts involving six transactions, eighteen counts, and on the conspiracy count. He was given a suspended sentence of twenty-seven months and a fine of $1,500.00. A motion of the appellant for a new trial and in arrest of judgment was denied. Before us the appellant urges that the only evidence that tied him to any illegal transactions was the "unsupported, contradictory, vague, equivocal and sometimes incredible" testimony of Skinner, an acknowledged accomplice of Fitzhenry; that the charges to the jury were erroneous, particularly with respect to criminal intent; that Government counsel made prejudicial insinuations of undisclosed knowledge of facts adverse to appellant; and that the jury argument of Government counsel was improper.

[1] The court properly charged that Skinner and the veterans would be, in effect, if not principals, accomplices whose testimony should be received with caution and scrutinized with care. It was Skinner's testimony that his initial contact with Fitzhenry was in the fall or early spring of 1950 or 1951 when he inquired if he could buy another home with a V. A. loan guaranty, he having already exercised his privilege of purchasing a dwelling with a V. A. guaranty. He quoted Fitzhenry as saying it would be all right if he were to get a veteran to buy the house for him and buy the house from the veteran. Skinner found a veteran, Joel W. Jackson, and a house was purchased which had been built by McClanahan under the supervision of Fitzhenry but with title in the developer, Oak Meadows Corporation. Fitzhenry then proposed to Skinner, so Skinner testified, that each of them would put up part of the necessary funds and they would get veterans to use their V. A. loan guaranty rights in acquiring residential properties and split the profits, but instead he

went to work for Fitzhenry securing veterans for a flat rate of fifty dollars. Skinner told of an occasion when he, Fitzhenry and the appellant were together discussing the availability of veterans, where they were most available and where they, the three of them, could get them the easiest. Skinner quoted appellant as telling him that he, Skinner, had better luck at Sinclair Rubber (among whose employees most of the veterans secured by Skinner were found), than appellant had with those contacted by him because, appellant is quoted as saying, the men that worked uptown were wiser than the guys that worked at Sinclair. Skinner testified regarding a transaction where the veteran was K. P. Bradshaw who wanted cash. McClanahan provided Skinner, so Skinner said, with a cashier's check for $400.00 payable to Skinner which he cashed. On two occasions, Skinner related, the appellant gave him a personal check or cash with which to pay the veteran. The testimony was plausible and there is no reason for rejecting or disregarding it.

[2, 3] A conviction may rest upon the uncorroborated testimony of an accomplice. Todorow v. United States, 9 Cir., 1949, 173 F.2d 439. The conviction here is not wholly dependent upon Skinner's testimony. The appellant took the stand. His testimony was in the same respects equivocal and in others contradictory. In telling of the deal with Jackson the appellant stated that he did know Jackson but he then (at the trial) understood that Skinner was the eventual or first owner of the house. He went on to say, "I have never known or met or heard of Mr. Skinner". He later testified:

> "Well, I had seen Mr. Skinner around this addition and see him talking to Fitzhenry, and everywhere I saw Skinner every time I saw him talking to anybody he always had some kind of a deal, he was

always promoting something, trying to sell a house or do this or do that. I mean, he mentioned several times he had these various houses or so forth lined up, I mean, at first I wasn't interested in it because Mr. Fitzrenry and I had planned to go ahead with this building.

"But at some time in there, well, he did come up with one and he talked to Fitzhenry about it or talked to me about it and if he talked to me I sent it back to Fitzhenry or told him to talk to Fitzhenry because I wasn't interested. Actually at that time I didn't want to fool with houses. I didn't know anything about the value of houses and property and so forth."

On cross-examination he was asked if Government counsel had misunderstood him to say that he had never known, met or heard of Mr. Skinner until the indictment. He responded "You did misunderstand me. I said I never knew or heard of Mr. Skinner until he came to us with these houses and so forth". It was established that each of the veterans involved in the substantive counts conveyed to the appellant. Without further extending our review of the facts, we deem it enough to say that the evidence shows that the appellant, with Fitzhenry, and through Fitzhenry and Skinner, knowingly and wilfully caused the false statements and representations to be made in the applications and affidavits involved in the six transactions from which stem the convictions on the substantive counts, and knowingly and wilfully, by trick, scheme and device caused to be concealed and covered up the material fact that the veterans did not intend to occupy the property ostensibly purchased by them.

[4, 5] The appellant takes up, one by one, the overt acts

listed in the conspiracy count of the indictment, and argues that no one of them is sufficient to support a conviction of the conspiracy charge. The evidence cannot be divided into small segments and each particle weighed separately. All must go into the scales together. The appellant stresses the fact that Skinner was unable to testify that there was an arrangement between Fitzhenry and the appellant. "The existence of the agreement or joint assent of the minds need not be proved directly, but may be inferred by the jury from other facts proved." 11 Am.Jur. 570, Conspiracy, § 38. The contention that the evidence is not sufficient to sustain the conspiracy conviction is not well founded.

While on the stand the appellant testified with respect to the advice that he had received from his attorney, Joe Jarrard, whom he met before he commenced buying properties from veterans. He testified:

> "I went to Mr. Jarrard's office to seek legal advice because he was a lawyer, and I knew as everyone else knew it was common practice for the veterans to sell houses which they then owned. I asked Mr. Jarrard if there was any legal technicality or anything that might come up later with respect to or with reference to buying property which had originally been bought by a GI and which was insured by what we referred to as a GI loan, and he told me that there was not."

Appellant said he relied upon this advice. He explained:

> "Before any transactions were made, before he drew any papers for me at all, I mean, I asked him this question: if there was any technicality in this

and he assured me there was not, so it was on his legal advice that I bought this property."

He denied any understanding that veterans were to be induced to make false statements to get title to houses, saying:

"There was no such understanding, and it was not done. We didn't induce anybody to buy houses. Any house that I bought, as far as I know the veteran had a title to it. Why he got the title to it, I don't know and, frankly, after I asked Jarrard if it was legal for me to buy the property I wasn't concerned with why the veteran had title to it. In other words, it was my understanding then, and it is still my understanding, if a person has legal title to property then it is theirs to do what they want to with it."

He further said:

"Before any deed was drawn into me I specifically asked if there was any technicalities involved in this and I got his specific answer of no."

[6, 7] The appellant requested an instruction on the consideration to be given to the matter of reliance upon legal advice. The substance of the requested instruction was that if such advice was followed, even though it was erroneous, the acts would not be wilful if done in reliance on the advice received. The appellant asked that "wilful" as used in the indictment be defined as meaning with bad purpose. A charge that for an act to be wilful it must be done with evil intent or bad purpose is not here applicable. Corcoran v. United States, 5 Cir., 1956, 229 F.2d 295. The jury were instructed that "The word 'wilful' means no more than an interdicted act, that is, a forbidden act that is done deliberately and with

knowledge." This language had our approval in McBride v. United States, 5 Cir., 1955, 225 F.2d 249, certiorari denied 350 U.S. 934, 76 S.Ct. 306, 100 L.Ed. ——. The advice of counsel would not justify the appellant in the wrongdoing condemned by the statutes under which he was indicted and convicted. The appellant relies upon Hargrove v. United States, 5 Cir., 1933, 67 F.2d 820, 90 A.L.R. 1276. This case was distinguished in the opinion in McBride v. United States, supra, and for like reasons is to be distinguished here.

[8] The appellant requested an instruction which would have told the jury, in effect, that without proof beyond a reasonable doubt that appellant knew false statements were being made by the veterans there could be no conviction. As in Russell v. United States, 5 Cir., 1955, 222 F.2d 197, 199, and as in Corcoran v. United States, supra, there is evidence that the appellant "was in on the commission of the offense from its inception and after its conclusion." The court incorporated in its jury instructions the statutory provision as to aiding and abetting. That which was said by this court in Russell v. United States, supra, is applicable here. From that opinion we quote:

> "Under the federal statute, 18 U.S.C.A. § 2, an accessory before the fact becomes a principal. [Citing cases.] There must exist a community of unlawful intent between the accessory and the perpetrator of the crime but '* * * an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him'. [Citing authorities.] It is not essential that the accessory know the modus operandi of the principal.

Keliher v. United States, 1 Cir., 193 F. 8, 17. In each of the cases of Todorow v. United States, 9 Cir., 173 F.2d 439, 443, and Turner v. United States, 9 Cir., 202 F.2d 523, the evidence was held sufficient to show that the defendant caused the false statements there involved to be made to the Veterans Administration." Russell v. United States, 5 Cir., 222 F.2d 197, 198-199.

The refusal to give the requested instruction was proper.

During the trial the appellant was being cross-examined about the part he played in one of the transactions. In responding to an objection for relevancy, the Government attorney commented:

> "If your Honor please, the reason that he didn't take a more active part openly in this transaction was that he was too busy as electrical inspector, and I think the evidence has now shown that probably the reason—there were probably other reasons for it."

Appellant now claims this statement was a suggestion that appellant was concealing something. We do not so regard it. Apparently appellant's counsel did not then think the remark improper as no objection was interposed, and the appellant himself, as in answering a question, said, "There was no other reason". The appellant was not prejudiced. A short time later the prosecutor was making inquiry of the appellant regarding one of the transactions. The following ensued:

> "Q. It says that the man was paid fifty dollars, and you heard Mr. Bradshaw come up here and testify that that came out of the veteran's file; was that

true? A. I don't know anything about this. This is the first time I seen it. My signature does not appear on it. I know nothing about this contract.

"Q. Your signature appears on none of these instruments, is that your testimony? A. I didn't say that. I said it doesn't appear on that instrument.

"Q. His Honor was asking you a few moments ago about your familiarity with the affidavits that are signed in connection with the closing of these matters. When a man has to swear a lie in order to accomplish, as you say, the exercise of his rights, do you think that is a scheme, trick, or device? A. If any man swore a lie I know nothing about it. I didn't swear a lie to anything.

"Q. I think the record is quite clear, Mr. McClanahan, that you stayed completely away from the paper work as much as possible. That is not my point.

"Mr. Cash: That is arguing with the witness and prejudicial. I ask that he be instructed not to make further statements like that.

"The Court: That is right."

No useful purpose was served by the United States Attorney arguing with the appellant but we do not see that it did harm. The court stopped the colloquy as soon as objection was interposed and the examination continued.

[9, 10] In argument to the Jury, Government counsel made reference to the failure of the appellant to call Joe Jarrard as a witness, he being the attorney who had advised the ap-

pellant. The failure of a party to produce as a witness one peculiarly within the power of such party creates an inference that such testimony would be unfavorable, and may be the subject of comment to the jury by the other party. Ford v. United States, 5 Cir., 1954, 210 F.2d 313. It is said that no inference arises, and hence no comment is permissible, "where the person in question is equally available to both parties; particularly where he is actually in court; though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly". Wigmore, Evidence, Vol. II, pp. 169-171, § 288. Here the person not called was or had been the appellant's attorney and it might be expected that his testimony, if given, would corroborate that of the appellant as to the legal advice given. In such situation it cannot be said that the attorney was as available to the prosecution as to the defense. The rule is thus stated:

> "• • • the question of equal availability of a witness not called is largely a question of fact, and various courts have regarded all manner of circumstances as bearing upon the matter." Jones Commentaries on Evidence, Vol. I, pp. 169-170, § 98.

It has been well said that "the availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case." Deaver v. St. Louis Public Service Co., Mo.App., 199 S.W.2d 83, 85.

[11] Ordinarily no inferences are permitted as a result of

the failure to call to the witness stand one whose testimony would be privileged. However, when the appellant testified as to the legal advice given him he waived the privilege he could otherwise have asserted to the testimony of his attorney; and such waiver would also raise the inference that the testimony would be unfavorable and allow the comment to the jury of the failure to call him as a witness. See Wigmore, Evidence, Vol. II, p. 167, § 286.

The appellant also urges that the conviction and sentence cannot stand because in his jury argument counsel for the United States referred to the appellant as a "profiteer" and as "top dog", and because of references to Skinner and the participating veterans as the "tentacles of the octopus", inferring, so appelant says, that he was the "octopus". These words, in the context in which they were used, did not go beyond proper comment and no harm resulted.

The failure to mention other matters urged by appellant does not mean that they have gone unnoticed. We have considered all questions raised and finding in none any error requiring reversal, the judgment appealed from is

Affirmed.

CAMERON, Circuit Judge, concurs in the result.